

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

VANDER WAAL BROTHERS, INC.
Facility #63232

Sioux County, Iowa

ADMINISTRATIVE CONSENT ORDER
NO. 2010-AFO- **43**

TO: John Vander Waal, Registered Agent
Vander Waal Brothers, Inc.
2745 Ibex Avenue
Hull, Iowa 51239

Tim Baker, Facility Contact
Extended Ag Services, Inc.
PO Box 134
Lester, Iowa 51242

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Vander Waal Brothers, Inc. (Vander Waal Brothers) for the purpose of resolving environmental violations at the Vander Waal Brothers' dairy operation located at 2745 Ibex Avenue, Hull, Iowa. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

Relating to technical requirements:

Brandon Miner, Field Office 3
Iowa Department of Natural Resources
Gateway Mall North - 1900 North Grand
Spencer, Iowa 51301
Phone: 712/262-4177

Relating to legal requirements:

Kelli Book, Attorney for the DNR
Iowa Department of Natural Resources
7900 Hickman Road, Suite 1
Windsor Heights, Iowa 50324
Phone: 515/281-8563

Payment of penalty to:

Director of the Iowa DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

II. JURISDICTION

This administrative consent order is issued pursuant to the provisions of Iowa Code section 455B.175(1), which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division III, Part 1, Iowa Code chapter 459 and Iowa Code chapter 459A and the rules adopted or permits issued pursuant thereto; and Iowa Code section 455B.109 and

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567 Iowa Administrative Code (IAC) chapter 10, which authorize the Director to assess administrative penalties.

III. STATEMENT OF FACTS

1. Vander Waal Brothers' Dairy is located in section 2 of Lincoln Township, Sioux County, Iowa. The dairy operation is permitted for a maximum animal unit capacity of 2,350 mature and immature dairy cattle. The cattle are housed in confinement buildings and open lots. The operation was issued a construction permit (CP-A2010-002) on January 29, 2010 for an expansion of the facility and the construction of runoff controls. Section 4 of the construction permit states that animals shall not be placed in the new confinement buildings until all of the following are satisfied: 1) construction is completed; 2) the facility's engineer submits a certification that the concrete floors of the bedding pack confinement buildings were constructed in accordance with the approved plans and specifications and were constructed in accordance with the minimum required separation distances as outlined in the regulations; 3) the existing shallow well adjacent to the proposed confinement buildings is properly abandoned and documentation indicating such is submitted; 4) the facility must notify DNR Field Office 3 at least three days prior to the initial concrete pour of the confinement building floors; and 5) the facility receives written approval from the DNR. An NPDES permit application was submitted with the construction permit application. The issuance of the construction permit begins the NPDES permit application review process.

2. On March 18, 2010, Brandon Miner, DNR Field Office 3 environmental specialist, and Paul Petitti, DNR environmental engineer, visited the Vander Waal Brothers' facility to conduct an inspection of the manure containment areas and to check on the construction progress. During the visit, the field office 3 personnel met with Tim Baker, facility contact. Mr. Miner and Mr. Petitti noted several different concerns at the Vander Waal Brothers' facility during their visit. They observed the secondary containment barrier located adjacent to the solids separator was full of manure solids and runoff water. They determined the secondary containment barrier was not designed to meet the design standards of an earthen manure storage structure and using it was prohibited by law. Mr. Miner and Mr. Petitti also observed snow with manure and feedstock mixed in piles adjacent to the creek in an uncontrolled area located to the south of the solids separator. The field office personnel noted that it appeared the runoff from the piles would flow to the creek. The field office personnel also noted that there was a newly constructed feedlot located directly south of the existing earthen basin and that the feedlot was populated with cattle. The field office personnel noted that the runoff from the feedlot was not contained and was flowing into the adjacent field. Mr. Miner and Mr. Petitti noted that the newly constructed confinement barn located east of the new feedlot was also populated. The engineer's report had not been submitted to the DNR and the DNR had not provided written approval to place animals in the barn. Additionally, the facility did not notify the field office prior to the initial concrete

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pour. The field office personnel observed open feedlot manure on the bank of the creek located to the south of the facility. It appeared to the field office personnel that the manure had flowed from the open lot and reached the creek.

3. On March 26, 2010, a Notice of Violation letter was issued to the Vander Waal Brothers' facility for the violations discovered by Mr. Petitti and Mr. Miner during the March 18, 2010 visit. The violations included failure to contain manure, improper stockpiling of manure adjacent to a water source; operation of an expanded/new open feedlot without an NPDES permit or proper runoff controls; populating a confinement building without DNR approval; and an unpermitted discharge of open lot manure to a water of the state. The letter informed the facility that the matter was being referred for further enforcement.

4. Vander Waal Brothers has received several Notice of Violation letters for previous environmental violations. On April 27, 2009, Vander Waal Brothers was issued a Notice of Violation letter for failing to contain all manure from confinement buildings and for stockpiling manure from confinement buildings in an uncontained area. On February 18, 2009, during a manure management plan inspection, DNR Field Office 3 personnel noted over application of manure and the application of manure to a field not in the manure management plan. On February 23, 2009, Vander Waal Brothers was issued a Notice of Violation letter for stockpiling manure from confinement buildings in an uncontained area. On December 17, 2004, a Notice of Violation letter was issued to Vander Waal Brothers for failing to report a manure spill that had occurred at the facility in December 2004.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 459.103 and Iowa Code section 459A.104 provide that the Environmental Protection Commission (Commission) shall adopt rules related to the construction or operation of animal feeding operations, including permit and minimum manure control requirements. The Commission has adopted such rules at 567 IAC chapter 65.

2. 567 IAC 65.2(3) states that the minimum level of manure control for a confinement feeding operation shall be the retention of all manure produced in the confinement enclosures between periods of manure application. On March 18, 2010, DNR Field Office 3 observed the secondary containment barrier located adjacent to the solids separator was full of manure solids and runoff water. This secondary containment barrier was not designed to meet the design standards of an earthen manure storage structure. A Notice of Violation letter was issued on April 27, 2010 for this violation. Additionally a Notice of Violation letter was issued on February 23, 2009 for the same violation. The above facts indicate violations of this provision.

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3. Iowa Code section 459A.403 states that a person shall not stockpile solids within four hundred feet from a designated area. A designated area means a known sinkhole, cistern, abandoned well, unplugged agricultural drainage well, agricultural drainage well surface tile inlet, drinking water well, designated wetland, lake, or water source. On March 18, 2010 DNR Field Office 3 observed stockpiles at the Vander Waal Brothers' facility within 400 feet of the creek. The above facts indicate a violation of this provision.

4. 567 IAC 65.104(3) states that a person intending to expand an existing animal feeding operation which, upon completion of the expansion, will be defined as a CAFO shall apply for an NPDES permit at least 90 days prior to the scheduled expansion. The operation of the expanded portion of the facility shall not begin until an NPDES permit has been obtained. The Vander Waal Brothers' facility is considered a large CAFO because it houses a total of 1,000 animal units or more in the confinement barns and the open feedlots. During the March 18, 2010 inspection, DNR Field Office 3 observed that a newly constructed open feedlot was populated with cattle. The runoff from the facility was not contained and was flowing into adjacent fields. The facility has not been issued a NPDES permit to date. The operation of the feedlot before building proper manure control structures and before obtaining a NPDES permit are violations of this provision.

5. Construction Permit CP-A2010-002 was issued to Vander Waal Brothers on January 29, 2010 and it required that animals shall not be placed in the new confinement buildings until an engineer submits a certification that the concrete floors of the bedding pack confinement buildings were constructed in accordance with the approved plans and specifications and until written approval is received from the DNR. During the March 18, 2010 inspection, DNR Field Office 3 observed that the new confinement barn had been populated prior to the engineer report being submitted and prior to written approval from the DNR. The above facts indicate violations of the construction permit.

6. 567 IAC 65.101(3) states that open feedlot operation which has an animal unit capacity of 1,000 animal units or more, or an open feedlot operation which is a large CAFO shall not discharge manure, process wastewater, settled open feedlot effluent, settleable solids or open feedlot effluent from an open feedlot operation structure or production area into any waters of the United States, unless the discharge is pursuant to an NPDES permit. During the March 18, 2010 inspection, DNR Field Office 3 observed open feedlot manure documented on the bank of the creek. At the time of the inspection, the proper runoff controls were not in place and an NPDES permit had not been issued. The above facts indicate a violation of this provision.

V. ORDER

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THEREFORE, the DNR orders and Vander Waal Brothers agree to do the following:

1. Vander Waal Brothers shall operate and maintain the animal feeding operation structures in compliance with all applicable DNR rules and regulations;
2. Vander Waal Brothers shall complete the construction of the open feedlot runoff controls authorized by the current construction permit within 90 days of the date the Director signs this administrative consent order so that a final NPDES permit may be issued;
3. Vander Waal Brothers shall pay a penalty of \$9,000.00 within 30 days of the date the Director signs this administrative consent order.

VI. PENALTY

1. Iowa Code section 455B.191 authorizes the assessment of civil penalties of up to \$5,000.00 per day of violation for each of the water quality violations involved in this matter.

2. Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000.00, which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties in 567 IAC chapter 10. Pursuant to this chapter, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative consent order with an administrative penalty of \$9,000.00. The administrative penalty is determined as follows:

Economic Benefit – Vander Waal Brothers has saved time and money by not building an additional manure storage structure, but rather used the secondary containment barrier for manure containment. Vander Waal Brothers has also gained an economic benefit by populating the facility without having proper containment in place and without DNR approval. It is estimated that Vander Waal Brothers has gained an economic benefit of at least \$3,000.00 by delaying the construction of the containment and by operating the facility without proper approval. Therefore, \$3,000.00 is being assessed for this factor.

Gravity – One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. DNR Field Office 3 documented a manure discharge to a water of the

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state. By failing to properly construct the containment, Vander Waal Brothers endangered the water quality of the nearby creek. Vander Waal Brothers applied for the proper permits but chose to construct and populate the facility without completing the construction and obtaining proper approval. Therefore, \$3,000.00 is assessed for this factor.

Culpability - Vander Waal Brothers has a duty to remain knowledgeable of DNR's requirements and to be alert to the probability that its conduct is subject to DNR's rules. Vander Waal Brothers has been issued numerous Notice of Violation letters in the past. Additionally, Vander Waal Brothers chose to populate the facility without fully complying with the permits. Therefore, \$3,000.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Vander Waal Brothers. For that reason Vander Waal Brothers waive the right to appeal this administrative consent order or any part thereof.

VIII. NONCOMPLIANCE

Compliance with Section V of this administrative consent order constitutes full satisfaction of all requirements pertaining to the violations described in this administrative consent order. Failure to comply with this administrative consent order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191.



RICHARD A. LEOPOLD, DIRECTOR
Iowa Department of Natural Resources

Dated this 2 day of
Sept., 2010.



X VANDER WAAL BROTHERS, INC.

Dated this 15 day of
August, 2010.

Facility #63232; Kelli Book, Brandon Miner (DNR Field Office 3), EPA, VIII.A.2,
VIII.D.1